BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

HELEN ATCHISON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,032,997
CRAIG HOMECARE, INC.	)	
Respondent	)	
AND	)	
	)	
TECHNOLOGY INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the December 5, 2008, Order For Medical Treatment of Administrative Law Judge Brad E. Avery (ALJ). Claimant was granted medical treatment with Steven G. Charapata, M.D., until further order.

Claimant appeared by her attorney, Jeff K. Cooper of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Bart E. Eisfelder of Kansas City, Missouri.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held December 4, 2008, with attachments; and the documents filed of record in this matter.

ISSUE

Did the ALJ exceed his jurisdiction under K.S.A. 2005 Supp. 44-510h in ordering respondent and its insurance carrier to provide medical treatment with Steven G. Charapata, M.D., rather than ordering respondent and its insurance carrier to provide a panel of three physicians from which claimant could choose her treating physician?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should remain in full force and effect and the appeal by respondent on this issue should be dismissed.

Claimant suffered an accidental injury which arose out of and in the course of her employment with respondent on February 10, 2006, when she slipped on a wet floor, injuring her low back. Claimant was treated with conservative care, including pain medication, physical therapy and work hardening. Claimant came under the care of board certified orthopedic surgeon Michael J. Schmidt, M.D. Dr. Schmidt diagnosed claimant with low back pain, secondary to early degenerative disc disease, exacerbated by claimant's recent work-related fall. He treated claimant conservatively, ultimately ordering a functional capacity evaluation (FCE). Based, in part, on the September 19, 2006, FCE, Dr. Schmidt determined that claimant had reached maximum medical improvement (MMI) by November 20, 2006, with her functional ability falling in the medium category. Claimant was restricted to occasional lifting of up to 50 pounds, frequent lifting up to 25 pounds and continuous lifting of up to 10 pounds. Forward bending and stooping were to be done only occasionally, and claimant's standing and walking were not restricted. Claimant was rated at 5 percent to the whole person pursuant to the fourth edition of the AMA *Guides*.[1] Claimant had also injured her left elbow in the fall, but Dr. Schmidt determined that claimant suffered no permanent disability to her elbow from the fall.

Claimant continued to experience pain and was referred by respondent to physical medicine and rehabilitation specialist Steven L. Hendler, M.D., for an evaluation and treatment in May 2007. Claimant was diagnosed with lumbar strain with chronic myofascial pain. Claimant was again treated conservatively, with medication and physical therapy. Dr. Hendler found claimant to be at MMI by October 3, 2007, and rated her in his report of January 23, 2008, at 5 percent to the whole body pursuant to the fourth edition of the AMA *Guides*.[2]

Claimant was referred by her attorney to board certified orthopedic surgeon Joseph W. Huston, M.D., for an examination on April 1, 2008. Claimant was again diagnosed with lumbar strain with mild chronic pain syndrome, from the injury at work on February 10, 2006. Dr. Huston also rated claimant at 5 percent to the whole body pursuant to the fourth edition of the AMA *Guides*.[3] Dr. Huston reviewed the FCE, determining

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[2] AMA *Guides* (4th ed.).

[3] AMA *Guides* (4th ed.).

claimant could work at the medium activity level. Claimant's lifting restrictions were the same as were given by Dr. Schmidt.

Claimant continued to experience pain and sought medical treatment with pain management specialist Steven G. Charapata, M.D. Dr. Charapata recommended a therapeutic block at right L4-5 and L5-S1. Dr. Charapata agreed with all the doctors who had treated claimant that she was not a candidate for surgery. The matter went to preliminary hearing on December 4, 2008, with claimant requesting the authorization of Dr. Charapata. Respondent offered to provide a panel of three physicians, if the ALJ determined treatment was proper. The ALJ ordered treatment with Dr. Charapata as requested.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-534a grants the administrative law judge the authority to determine a claimant's request for temporary total disability and ongoing medical treatment at a preliminary hearing. The Board's review of preliminary hearing orders is limited to specific issues as set forth in the statute.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?[4]

It is clear neither K.S.A. 44-534a nor K.S.A. 2005 Supp. 44-510k limit an administrative law judge's ability to make determinations of ongoing disputed issues regarding pre- or post-award medical care.

Respondent argues that the ALJ exceeded his jurisdiction in granting claimant's request to authorize Dr. Charapata, rather than allowing respondent to nominate a panel

[4] K.S.A. 44-534a(a)(2).

of three physicians from which claimant would choose the authorized treating physician. However, the Board has ruled in the past and continues to hold that this is not a jurisdictional issue subject to review on an appeal from a preliminary hearing Order.[5]

While the Board generally has no jurisdiction on an appeal from a preliminary order to consider matters of medical treatment, whether an ALJ has exceeded his or her jurisdiction is jurisdictional. After a thorough review of this file, this Board Member finds nothing to suggest that the ALJ exceeded his jurisdiction in ordering Dr. Charapata as the authorized treating physician. Administrative law judges must routinely determine the most appropriate method of treatment and the necessity of that treatment in order to satisfy the Workers Compensation Act's goal of curing and relieving the effects of an injury.

K.S.A. 2005 Supp. 44-510h states:

> (a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.
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> (b) (1) If the director finds, upon application of an injured employee, that the services of the health care provider furnished as provided in subsection (a) and rendered on behalf of the injured employee are not satisfactory, the director may authorize the appointment of some other health care provider. In any such case, the employer shall submit the names of three health care providers who, if possible given the availability of local health care providers, are not associated in practice together. The injured employee may select one from the list who shall be the authorized treating health care provider. If the injured employee is unable to obtain satisfactory services from any of the health care providers submitted by the employer under this paragraph, either party or both parties may request the director to select a treating health care provider.
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> (2) Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of $500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional

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[5] See *Hubbard v. Wesley Medical Center, LLC.*, No, 1,040,850, 2008 WL 5122323 (Kan. WCAB Nov. 7, 2008); *Spears v. Penmac Personnel Services, Inc.*, No 1,021,857, 2005 WL 2519628 (Kan. WCAB Sept. 30, 2005).

> impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.
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> (c) An injured employee whose injury or disability has been established under the workers compensation act may rely, if done in good faith, solely or partially on treatment by prayer or spiritual means in accordance with the tenets of practice of a church or religious denomination without suffering a loss of benefits subject to the following conditions:
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> (1) The employer or the employer's insurance carrier agrees thereto in writing either before or after the injury;
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> (2) the employee submits to all physical examinations required by the workers compensation act;
>
> (3) the cost of such treatment shall be paid by the employee unless the employer or insurance carrier agrees to make such payment;
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> (4) the injured employee shall be entitled only to benefits that would reasonably have been expected had such employee undergone medical or surgical treatment; and
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> (5) the employer or insurance carrier that made an agreement under paragraph (1) or (3) of this subsection may withdraw from the agreement on 10 days' written notice.
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> (d) In any employment to which the workers compensation act applies, the employer shall be liable to each employee who is employed as a duly authorized law enforcement officer, firefighter, driver of an ambulance as defined in subsection (b) of K.S.A. 65-6112, and amendments thereto, an ambulance attendant as defined in subsection (d) of K.S.A. 65-6112, and amendments thereto, or a member of a regional emergency medical response team as provided in K.S.A. 48-928, and amendments thereto, including any person who is serving on a volunteer basis in such capacity, for all reasonable and necessary preventive medical care and treatment for hepatitis to which such employee is exposed under circumstances arising out of and in the course of employment.[6]

When a record reveals the Board's lack of jurisdiction to review a question, the Board's authority extends no further than to dismiss the action.[7]

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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[6] K.S.A. 2005 Supp. 44-510h.

[7] *State v. Rios*, 19 Kan. App. 2d 350, 869 P.2d 755 (1994).

[8] K.S.A. 44-534a.

CONCLUSIONS

The ALJ did not exceed his jurisdiction in ordering treatment for claimant with Dr. Charapata. Therefore, the appeal by the respondent should be dismissed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order For Medical Treatment of Administrative Law Judge Brad E. Avery dated December 5, 2008, should remain in full force and effect, and the appeal by respondent should be, and is hereby dismissed.

IT IS SO ORDERED.

Dated this ____ day of February, 2009.

HONORABLE GARY M. KORTE

c: Jeff K. Cooper, Attorney for Claimant
Bart E. Eisfelder, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge